

1 IN THE UNITED STATES DISTRICT COURT
2 NORTHERN DISTRICT OF ILLINOIS
3 EASTERN DIVISION

4 UNITED STATES OF AMERICA, }

4 Government, } No. 08 CR 888
5 vs. }

5 ROD BLAGOJEVICH, } Chicago, Illinois
6 Defendant. } June 16, 2011
7 } 9:43 o'clock a.m.
8

9 VOLUME 33
10 TRANSCRIPT OF PROCEEDINGS
11 BEFORE THE HONORABLE JAMES B. ZAGEL
12 AND A JURY

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18 (The following proceedings were had in
19 Chambers Room 2588 with Court and counsel:)

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QUESTION BY THE JURY

23 THE COURT: We have two things to discuss,
24 one which we will do in open court. There was a
25 note from the jury.

1 what was the page?

2 COURT'S LAW CLERK: 28.

3 THE COURT: Page 28, the third element, the
4 one that says "representations, promises,"
5 blah-blah-blah. They want guidance. It's not clear
6 what kind of guidance they want. Maybe they're
7 concerned about the word other side "material,"
8 maybe they're concerned about the fact that we use a
9 lot of words for the same thing. So we will discuss
10 that. And I expect that shortly thereafter, you'll
11 want some time to look up a little law. This is the
12 question, I'll read it out loud, I will do the same
13 thing outside:

14 "The jury would like clarification on the
15 third proposition page 28 of the jury
16 instructions ..."

17 that's all they said.

18 The second reason you are here is something
19 which we are doing in chambers and something that
20 will result in the entry of an order.

21 The government gave me notification about
22 something that was done on WTTW and then sent me a
23 disk, and someone else, my wife, saw something on
24 ABC. I've looked at both of them. I got them on
25 the web, I didn't see them when they were broadcast.

1 I also noticed when I was watching the CBS
2 news this morning, the younger Sam Adam was
3 advertising appearing on CBS news at 4:30.

4 I'm going to enter an order barring
5 statements by any counsel for either party, and by
6 any counsel that means anybody who has appeared in
7 this case and has not been permitted to withdraw
8 their appearance, I'm going to enter an order
9 barring any public statement about the trial.

10 With respect to the thing in WTTW, what it
11 began with was an assertion by the two counsel,
12 Goldstein and Kaeseberg, saying that basically that
13 they can't comment, and then they did, asserting
14 that the defendant always spoke the truth and
15 there's evidence out there that will prove him
16 innocent. There's actually not too much in the way
17 of single pieces of evidence that prove anybody
18 innocent, there is evidence that tends to show
19 innocence, and I think that that's what they meant.

20 The only piece of evidence I have ever seen that
21 proves somebody innocent was a surveillance camera
22 of a homicide and the shooter was obviously not the
23 defendant on trial.

24 The comments of the younger Sam Adam were
25 less egregious, partly because it began with the

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1 reporter saying "we want you to be objective" and he
2 said he really couldn't be, but those comments were
3 pretty temporary. They were basically comments
4 about what he thought a jury might do.

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5 It is true that I regard this jury as
6 exceptionally diligent and unlikely to watch
7 anything or read anything. I thought their
8 diligence was clearly manifested in second line of
9 the note they sent yesterday in which they said that
10 there were differences between the two transcripts,
11 there were extra pages, and after pointing this out
12 to me there was a separate line saying we have not
13 read the extra pages, which means they instructed
14 themselves that they shouldn't read the extra pages.

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15 The problem that concerns me with this,
16 particularly if one is talking about what the jury
17 might or might not do or comments about the jurors,
18 and the younger Sam Adam did make a comment about
19 his preference for women jurors, what jurors usually
20 see, if they see anything at all, is some kind of
21 tag line, something in the promotional thing,
22 so-and-so will be here and then they know to turn it
23 off. It's like seeing the headline in the
24 newspaper, you don't read the story.

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25 I think, in my view, it increases the

1 temptation to the jurors because it's a promotion by
2 the media that this is going to be about the jurors
3 or the jury, and I think that's a temptation. But
4 what is mainly wrong with it is not that it
5 necessarily will contaminate the jury, it just adds
6 an element of risk that after this expenditure of
7 time and effort should not be tolerated.

8 I believe one of the defense counsel made a
9 statement about the enormous cost of a retrial. The
10 statement was inaccurate, but the truth is is
11 retrials do cost. And if by some chance this rare,
12 slightly increased risk results in something which
13 requires further trial proceedings in this case,
14 that's a cost that the government, which is pretty
15 much bearing the entire cost here, the government
16 should not be forced to pay.

17 So I am barring all public statements by all
18 counsel until the verdict has been reached.

19 I have actually given some thought to the
20 proposition that no comment should be allowed until
21 a verdict has been returned on all counts, because
22 it's possible we might have a verdict and there
23 might be extra counts on which they couldn't reach a
24 verdict, but I decided not to do that because should
25 that occur again, the period of time which would

1 elapse between that and any further proceedings is
2 likely to be long enough to dissipate concerns.

3 So I'm making as narrow a rule as I can, and
4 the order expires roughly one minute after the
5 verdict is read in court.

6 There are other grounds and other reasons for
7 such orders and such restrictions, but in this
8 particular high publicity case, I am mainly
9 concerned with the risk I've just identified. There
10 may also be issues of appropriate conduct under the
11 various canons that govern lawyers' conduct, but it
12 will be premature for me to make a judgment on that.
13 So there is an absolute bar for whatever time it
14 takes to reach a verdict.

15 It is also extremely important that this
16 notice of this be given to all counsel who are still
17 of record. My clerk has on several occasions
18 attempted to reach the elder Sam Adam and the
19 younger Sam Adam and has been unsuccessful in doing
20 so, but he has informed them of what the nature of
21 the order is. I would appreciate the assistance of
22 defense counsel who are here in getting that message
23 to them, because my other alternative is to have a
24 written order and send a marshal out to find them.

25 MR. SOROSKY: We'll reach out to them.

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1 THE COURT: Yeah.

2 MR. SOROSKY: I noticed -- or you said Sam
3 Adam, Jr., was announced to be on a show this
4 afternoon?

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5 THE COURT: At 4:30.

6 MR. SOROSKY: Okay. So we'll try to get to
7 him before 4:30.

8 THE COURT: Now, for all I know, this was
9 taped, which creates a problem for me, but

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10 MR. SOROSKY: They usually want the lawyers
11 live, so it probably is not.

12 THE COURT: Yeah, I think it's probably not
13 taped.

:59AM

14 Now, another point I would like to make is,
15 in my experience, lawyers go on television for one
16 reason more than any other, and it's not to subvert
17 the jury. They go on television because it's a form
18 of lawyer advertising for which they don't have to
19 pay. There is nothing wrong with lawyer
20 advertising, it is a perfectly legal thing to do,
21 people can promote themselves all of the time. But
22 the value of this lawyer advertising, which I don't
23 doubt, I have been given numerous examples and heard
24 a lot of informal chatter among lawyers, one in
25 particular is a major litigator of civil cases had a

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1 disastrous loss, lost many, many millions of dollars
2 for a very large client and he thought that it would
3 damage his career, and a year later he was making a
4 pitch to a large corporation and he was very
5 concerned, then somebody said weren't you in the
6 so-and-so case, and he once told me his heart sank,
7 and he said yes, I was, and the guy who questioned
8 him said, hey, that was a big case, just you were in
9 a big case, you must be a good lawyer. So that's an
10 advantage for a lawyer in any high publicity case,
11 but that advantage will exist after the verdict, as
12 well as it does before the verdict.

13 And more importantly, in some cases, going on
14 the air presents risks to the defense even if a jury
15 does see it, because there remains the fact that
16 some juror might see this, take a look at the
17 lawyers for the defense and say I don't like them.
18 There is no guarantee and not necessarily a
19 probability that whatever influence the defense
20 counsel have on a jury, if they do manage to see it,
21 will favor their client. A juror might take one
22 look at the younger Sam Adam and develop bad
23 feelings about him because he's overweight or they
24 don't like the way he talks or maybe they don't like
25 somebody's last name, and it's the kind of stuff you

:03AM 1 never hear about. The proposition that what a
2 defense lawyer does on the air proclaiming innocence
3 helps the client is one that ought to be critically
4 examined by the lawyers who do it, and pretty much
5 they never do. They never say, well, would somebody
6 be offended by my saying this.

:03AM 7 Interestingly enough, I think pretty much all
8 lawyers do when they talk about talking in front of
9 a jury. They think about, well, is what I'm going
10 to say going to upset a juror. The same rule
11 applies to televised appearances. And I don't know
12 that anybody who did appear on television took a
13 fairly rigorous analysis of whether this is going to
14 help or hurt the client.

:03AM 15 At the close of the WTTW thing that I saw,
16 the interviewer said to the lawyers who appeared at
17 that time, you know, why are you here, we asked the
18 government, the government said they would never
19 comment on a case before a verdict, and the response
20 was we came because we were invited. Considering
21 the gravity of the consequences of this case, I
22 thought that was hard to flip into a response. What
23 I'm saying here is not the order itself, it's my
24 advise to counsel even in situations where
25 television appearances are permitted, to exercise

1 some caution in doing so. My order eliminates the
2 need to consider that caution because I'm saying no.

3 I will embody this in a written order which I
4 will file under seal and you are free of course to
5 seek mandamus from the Court of Appeals of the
6 Seventh Circuit if anybody here does not like this
7 ruling.

8 I would like to get some verification from
9 Mr. Sorosky or one of the defense team that they
10 have in fact notified the other lawyers.

11 MR. SOROSKY: We will do that and we will
12 call you when we complete that.

13 THE COURT: That's fine.

14 MR. SOROSKY: Now, let me ask you one
15 question because I'm sure it could come up when we
16 speak to Sam Adam, Jr. if he has to cancel a
17 previous arranged agreement, so to speak.

18 THE COURT: Yes. Right.

19 MR. SOROSKY: Is he --

20 THE COURT: He is free to say that there is a
21 court order against it.

22 MR. SOROSKY: I just wanted to know.

23 THE COURT: Yes.

24 MR. SOROSKY: Do you want -- obviously the
25 media is going to hound the people on the defense

1 side what went on back there.

2 THE COURT: Yes.

3 MR. SOROSKY: Can we tell them?

4 THE COURT: I order you not to tell them --

5 MR. SOROSKY: Okay.

6 THE COURT: -- because what will happen if
7 you did that --

8 MR. SOROSKY: We will not.

9 THE COURT: Yeah, but there's a reason for
10 it, it's not an arbitrary prohibition. The reason
11 that is the case is, what is likely to happen is for
12 those media who have already recorded this, they'll
13 play it again, they'll play it again because they
14 say, you know, we're prohibited by court order from
15 doing this but we exclusively have young Sam Adam
16 here on ABC and, you know, this must be significant
17 because the court ordered it.

18 MR. SOROSKY: Well, if Sam Adam, Jr. relates
19 to CBS that he can't be on because of the judge's
20 order, then, I mean, that will go through the entire
21 media like wild fire --

22 THE COURT: The truth of the matter is is
23 what he should simply do is to decline and offer no
24 explanation. So that's my order now, because you
25 have made a good point, Mr. Sorosky.

1 MR. SOROSKY: Yeah. We'll go through that.

2 THE COURT: The other thing is is by chance
3 the media will have something else to write about
4 today, which is the question on the instruction.

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5 So we're going to resume in open court
6 shortly.

7 MS. KAESEBERG: Can we see the note? Because
8 I want to make sure we have it right.

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9 MR. SCHAR: Judge, is it possible for us to
10 get a copy of page 28 or we can go back downstairs?

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11 THE COURT: We'll copy it.

12 (The following proceedings were had out of
13 the presence of the jury in open court:)

14 THE COURT: Counsel, approach the lectern.

15 (Brief pause).

16 THE COURT: As I have informed counsel in
17 chambers, we received an inquiry from the jury, the
18 inquiry I will read it:

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20
21 ".... the jury would like clarification on
22 the third proposition page 28 of the jury
23 instructions."

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24 To put this in context, I'll read the whole
25 instruction:

1 ".... Counts 1 through 10 of the indictment
2 charge the defendant with wire fraud. To
3 sustain the charge of wire fraud as
4 charged in Counts 1 through 10 the
5 government must prove the following
6 propositions beyond a reasonable doubt:

7 First, that the defendant knowingly devised
8 or participated in a scheme to defraud the
9 public of its rights to the honest
10 services of Rod Blagojevich or John Harris
11 by demanding, soliciting, seeking, asking
12 for, or agreeing to accept a bribe in the
13 manner described in the particular count
14 you are considering;

15 Second, that the defendant did so with the
16 intent to defraud;

17 Third, that the scheme to defraud involved
18 a materially false and fraudulent
19 pretense, representation, promise, or
20 concealment;

21 And fourth, that for the purposes of
22 carrying out the scheme or attempting to
23 do so the defendant used or caused the use
24 of interstate wire communications to take
25 place in the manner charged in the

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1 particular count you are considering."

2 This means that the jury has asked for
3 clarification of the following words:

4 ".... that the scheme to defraud involved a
5 materially false and fraudulent pretense,
6 representation, promise, or concealment."

7 This, in my initial reading of it, presents
8 two possible interpretations of what they want
9 clarification of. Although, there are three basic
10 concepts here, three basic categories of this
11 instruction, the first one is "materially," the
12 second one is "false and fraudulent," and the third
13 group includes "presence, representation, promise,
14 or concealment." I do not believe the jury could
15 possibly be asking for definition clarification of
16 false and fraudulent, what they might be asking for
17 is "materially" on one hand and/or "pretense
18 representation, promise, or concealment."

19 we have informed the jury, through the court
20 security officer, that some time will pass before
21 they receive a response to the inquiry, because you
22 don't like them to be sitting there just waiting for
23 this.

24 My belief is that this might require some
25 level of research or thought before the sides make a

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1 final decision as to what position they would take.
2 If my assumption is untrue, you could tell me now.

3 MR. SCHAR: Judge, we discussed it and I
4 think the issue is difficult to know precisely what
5 it is that they want clarification on, which we have
6 several different options. One is to provide
7 clarification on a variety of different things, and
8 the other is there is some clarification within the
9 instructions --

:21AM 10 THE COURT: There is.

11 MR. SCHAR: -- generally, as they continue to
12 read on. I'm assuming they have done that, but
13 maybe they have not.

14 I think it was our initial reaction, unless
:21AM 15 Your Honor thinks we should be approaching it
16 differently, to indicate that they should re-read
17 the instructions and then if they continue to have
18 questions, provide a little more specific
19 information as to precisely what they want
20 clarification on so the issue can be narrowed and I
21 think a more precise can be provided, which I'm not
22 sure what we can possibly do at this point.

23 MR. GOLDSTEIN: We agree, Your Honor.

24 THE COURT: which leads to the next question.
25 :21AM we have a form, a jury inquiry form, we also have a

1 response to the jury form, both of these forms do
2 not have any little number authorizing it from the
3 general printing office, we make this up all by
4 ourselves, and this one says "response to jury." I
:22AM
5 have on occasion filled in "responses to jury" by
6 asking a question of them, which may actually be
7 helpful for me to present to them what it is that
8 they want clarification on. In other words, the
9 court would like to know if you can, tell us, which,
:22AM
10 if any, of the following terms do you want clarified
11 or whether you want all of them clarified. I think
12 maybe that might advance us a little further.

13 The defense express a view?

14 MS. KAESEBERG: Our preference would just be
:23AM
15 that before asking that question, as Mr. Schar said,
16 send a statement saying something to the effect of
17 you can continue to read the instructions and if you
18 need further clarification then pose a question. I
19 think as it stands we rather have them just read --
20 because there is clarification within the
21 instructions, but if they haven't gotten to that
22 happen point yet we'd like them to get there first.

23 MR. SCHAR: Judge, I think it ought to be, at
24 a minimum, two-fold, I don't think it should just be
25 to continue to read the instructions.

1 THE COURT: I almost never give a
2 continue-to-read instructions alone because there's
3 a subtext there which would begin if you -- the one
4 with the subtext is the real text is "you idiots,
5 continue to read this."

:23AM

6 MS. KAESEBERG: I did mean twofold, if I
7 wasn't clear, I meant before you pose the question
8 tell them to do that first.

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9 MR. SCHAR: I think it could be done in a way
10 such as: If after reading all the instructions you
11 still need clarification, please provide some
12 indication, something like that.

:25AM

13 More specificity as to which part of the
14 third line you need clarification on.

:26AM

15 (Brief pause)
16 THE COURT: When you refer to the fact that
17 there are definitions in there, the only one I see
18 that is--and it's here--that is traditionally a
19 specific definition is the definition of
20 materiality. So my guess, and it's only a guess, I
21 could be wrong, is "presence, representation,
22 promise or concealment" that's at issue here.

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23 (Brief pause)

24 THE COURT: Okay, this is my first draft in
25 which I try to avoid the implied insult:

1 "I ask you to take another look at the
2 relevant instructions and after you've
3 done so I ask you to specify --" "... I
4 ask you to state which specific words or
5 phrases in the third proposition that you
6 believe you need clarification."

7 I'll read it again:

8 ".... I ask you to take another look at the
9 relevant instructions and after you have
10 done so I ask you to state which specific
11 words or phrases in the third proposition
12 you believe need clarification."

13 MR. SOROSKY: After the afraid "after you've
14 done so," could we put in the phrase "if you so
15 need"? Because your instruction somewhat implies
16 they should ask for something, but, you know, maybe
17 perhaps they may feel after looking at the
18 instructions they may not need to come back to the
19 Court.

20 MR. SCHAR: That's fine, Judge. "If
21 necessary."

22 THE COURT: Yeah. Okay, now we are at this
23 one:

24 "I ask you to take another look at the
25 relevant instructions, if necessary, I ask

1 you to state which specific words or
2 phrases in the third proposition you
3 believe need clarification on."

4 MR. GOLDSTEIN: I think it was "take another
5 look at at the relevant instructions and if
6 necessary after you do so could you state what it
7 was." I mean what --

8 THE COURT: You want me to repeat this again?

9 MR. GOLDSTEIN: Yeah, maybe I misheard it.

10 THE COURT: okay. Actually, "maybe if
11 necessary" is

12 (Brief pause)

13 THE COURT: It's now two sentences:
14 ".... I ask you to take another look at the
15 relevant instructions if you believe this
16 would be helpful. I ask you to state
17 which specific words or phrases in the
18 third proposition you believe need
19 clarification."

20 Let me say it again just so everybody's got
21 it --

22 MR. SCHAR: I think the issue is slightly
23 flipped --

24 THE COURT: Yeah, it is flipped.

25 MR. SCHAR: -- in the sense that I assume you

1 are going to ask them to go back and look at the
2 instructions and if after looking at the
3 instructions it's still necessary that they need
4 clarification, that I think is the issue.

:33AM

5 THE COURT: Is that okay with you?

6 MR. GOLDSTEIN: Sure.

7 MR. SOROSKY: Sure. Sure. Absolutely.
8 Because -- right.

9 THE COURT: Say that again, Mr. Schar.

:33AM

10 MR. SCHAR: Judge, I think it would be your
11 first sentence ending with a period after
12 instructions, I ask you to go back and look at the
13 relevant instructions, period, and then -- I can't
14 remember exactly -- --

:34AM

15 MS. KAESEBERG: "After you've done --"

16 (Court reporter reading:)

17 MR. SCHAR: "If after doing so"

:34AM

18 MS. KAESEBERG: I think it's "after you've
19 done so, if necessary, I ask you to state the
20 specific words."

21 THE COURT: Okay, so we are abandoning
22 Mr. Sorosky's thing which tells them you can decide
23 whether or not you want to take a another look at
24 the instruction.

:34AM

25 MR. SOROSKY: I think it's in accord.

1 MS. KAESEBERG: It's the same thing.
2 THE COURT: It's fine. I mean --
3 MR. SCHAR: If you would just read the second
4 sentence.

:34AM

5 THE COURT: Okay, try it with me again:
6 ".... after you have done so, if you think
7 it is necessary, I ask you to state which
8 specific words or phrases in the third
9 proposition you believe you need
10 clarification."

:35AM

11 I'll say it again --

12 MR. SOROSKY: Before you state it, let me
13 throw out one other suggestion.

14 THE COURT: Sure.

:35AM

15 MR. SOROSKY: Instead of relevance, instead
16 of "relevant instructions" you might want to use the
17 phrase "instructions you have already received,"
18 because I think by "relevance" we mean the
19 instructions they have already received but may not
20 hit home to the jury.

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21 MR. SCHAR: Okay, I'm assuming what you want
22 to do, you're trying to guide them to the
23 instruction that deal with wire fraud as opposed to
24 all of the instructions.

:35AM

25 THE COURT: Right.

1 MR. SCHAR: So I think "relevant" makes sense
2 to me.

3 THE COURT: I think so, too. If this weren't
4 an element of one specific offense and not elements
5 of others.

6 So the final version thus far unless somebody
7 has another suggestion:

8 ".... I ask you to take another look at the
9 relevant instructions. After you have
10 done so, if you think it is unnecessary, I
11 ask you to state which specific words or
12 phrases in the third proposition you
13 believe need clarification."

14 MR. SCHAR: That's fine, Judge.

15 MR. SOROSKY: Yes.

16 THE COURT: okay, that's what we'll send
17 them. Don't go far.

18 Actually, my suggestion is is that you go to
19 some nearby library or computer and start
20 researching on what you believe might be the
21 possible request.

22 MR. SOROSKY: Is the jury going to go to
23 lunch now?

24 THE COURT: I don't know. No, the thing is
25 that, and I've told the jury this, that once they

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1 get the case, they no longer do what I tell them to
2 do at the time I tell them to do it. These are
3 decisions that are theirs. And they vary from day
4 to day. So I don't know. They could very well be
5 at lunch now. They're in charge.

6 MR. SCHAR: Thank you, Judge.

7 MR. SOROSKY: Thank you.

8

9 (Adjournment taken 11:37 o'clock a.m.)

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25 I CERTIFY THAT THE FOREGOING IS A CORRECT TRANSCRIPT

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1 FROM THE RECORD OF PROCEEDINGS IN THE ABOVE-ENTITLED
2 MATTER

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4

5 /s/Blanca I. Lara

date

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Blanca I. Lara

Date